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IN THE

Supreme Court of the United States

October Term, 1959

No. [redacted] 32

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFFER OIL TRANSPORT CO., INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Christian F. Braen, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action pursuant to its decision dated January 3, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals (Swan, C.J., concurred in by Moore, C.J., Kaufman, D.J., dissenting) which reversed the District Court for the Eastern District of New York (Bruchhausen, J.) is not reported. A copy thereof is contained in the Appendix, at pages 15-20. There was no opinion by the District Court Judge.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1959. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Where in a Jones Act case a jury has found that the injured was a seaman and a member of a crew hurt in the course and scope of his employment by the negligence of his employer so as to be entitled to his remedies under the statute, and the District Judge has denied motions to set the verdict aside and for judgment n.o.v., was there that complete absence of probative facts to support the conclusion reached by the jury (*Lavender* v. *Kern*, 327 U. S. 645, 653), which empowered the Court of Appeals to overturn the jury findings on the issue of the injured's status at the time he was hurt and itself direct final judgment against the injured?

2. If the Court of Appeals erred in holding that there was no question of fact as to the status of the petitioner at the time he was injured, should the case be remanded for a new trial because of the alleged deficiencies in the District Court's instructions to the jury on that issue?

STATUTES INVOLVED

The statutes involved are the Jones Act (46 U. S. C. A. 688) and the Longshoremen & Harbor Workers' Compensation Act (33 U. S. C. A., Sec. 901 *et seq.*), printed in the Appendix annexed hereto, *infra,* at pp. 21-22.

STATEMENT OF THE CASE

Preliminary

This is not a case where a temporary worker on a ship whose general employment and duties are unconnected with the vessel seeks to assume the mantle of a seaman or a member of a crew in order to gain the benefits of the Jones Act. In this case, the injured had been in a continuous and long employ as a seaman and a member of the crew of the barge and the Pfeiffer No. 2, and had never been discharged from his employment. It is conceded that at 8:00 o'clock in the morning of the day of his accident, petitioner was working aboard the Pfeiffer as a seaman and a member of its crew. It is conceded that when he was injured less than an hour later by a fall from another of his employer's barges, the Winisook, to which the Pfeiffer No. 2 had been moored, he was about to do work that his employer had directed him to do.

The question here presented is simply this: did anything happen in that hour or less between 8:00 o'clock in the morning and the time he was injured to disestablish him as a seaman and a member of the crew and to transform him into something else. The jury has said that nothing had happened to cause this transformation, the Court of Appeals has said that as a matter of law there had been such a transformation.

FACTS

The Pfeiffer Oil Company was in the business of transporting petroleum products; in the conduct of that business it used barges and tug boats (Pfeiffer App., p. 48). Petitioner was a seaman who had Coast Guard ratings as a Chief Cook, Chief Steward and a Barge Tankman's Certificate (Pfeiffer App., p. 22).

He had been employed by Pfeiffer as a mate aboard its barge, the Pfeiffer No. 2, for about four months prior to January 22, 1953 (Pfeiffer App., pp. 21, 22, 23, 42). As of January 22nd he had been working twelve hours a day for two weeks (Braen App., p. 4). His duties were:

> "My duties were many. We handled all the lines at all times, both in making to a dock, leaving a dock, attaching the tug to the vessel; it was non-propelled, non-self-propelled, leaving the tug go, and we loaded and unloaded the cargo.
>
> "We handled the hose for the loading and the unloading of the cargo, which we refer to as the cargo hose, and we prepared our own food. We put up our navigation lights when necessary, done the maintenance of the barge, painting, chipping, scraping, things

like that; and minor repairs, repairs that we could handle between the two men aboard the barge." (Pfeiffer App., p. 22)

The Captain of the Pfeiffer No. 2 testified to the same effect (Pfeiffer App., p. 42).

Petitioner was protected in his employment status by a union contract (Pfeiffer App., p. 22; Braen App., p. 11). This contract provided that a crew member could not be laid off except on three days' notice after a vessel was moored in her berth (Braen App., p. 12). The contract also protected the employer, providing that if a crew member quit his job without giving him three days' notice of his intention to leave, he forfeited three days' pay to the employer (Braen App., p. 12).

A day or two before the accident, while the Pfeiffer was in transit, one of its pumps became out of order (Pfeiffer App., p. 23). Accordingly, the vessel was ordered to Pfeiffer's repair yard at West New Brighton, Staten Island, where it arrived on January 21, 1953 (Pfeiffer App., pp. 23-24; Braen App., p. 54).

Among the facilities maintained by Pfeiffer for the repair of its vessels at the West New Brighton Yard was a floating barge, the Winisook (Pfeiffer App., pp. 29, 36, 37, 43, 49, 53; Exhibit 2 at Pfeiffer App., p. 60; Exhibit B at Pfeiffer App., p. 62). It was secured to the dock by lines and cables (Pfeiffer App., pp. 43, 45, 46, 53), an arrangement that permitted the barge to be shifted and turned around in the water when necessity or convenience in repair dictated the need (Pfeiffer App., p. 31).

The space between the Winisook and the dock was occupied by a floating raft (Pfeiffer App., p. 27), depicted

in the exhibits at pages 60 and 62 of Pfeiffer's Appendix. It was held in place by a line attached to the Winisook (Braen App., p. 3).

The purpose of the raft, owned by Pfeiffer (Pfeiffer App., p. 49) was to facilitate chipping, painting and welding work on such of Pfeiffer's vessels as required such procedures (Pfeiffer App., p. 30; Braen App., p. 8).

When the Pfeiffer No. 2 arrived at West New Brighton it was moored to adjoin the open water side of the Winisook (Exhibit 1 at Pfeiffer App., p. 59). It was going to be there for no more than a day or two (Braen App., p. 8). It was admitted that in order for the crew of the Pfeiffer No. 2 to leave or board it, they had to go by way of the Winisook, utilizing a planked ledge or catwalk that ran around its sides (Braen App., pp. 2, 4-5-6, 9, 10), Exhibit 1 in Pfeiffer App., p. 60; Exhibit B in Pfeiffer App., p. 62). In other words, the catwalk of the Winisook was a necessary means of passage from and to the Pfeiffer No. 2.

The catwalk had been in bad shape for a long time, splintered and worn (Braen App., pp. 2, 3, 7). Complaints had been made to those in authority but nothing had been done about it (Braen App., p. 4).

When the Pfeiffer was moored on January 21st, petitioner, together with others, began work on disassembling the defective pump (Pfeiffer App., pp. 24, 31). Work ceased at approximately 4:00 o'clock in the afternoon, to be resumed at 8:00 o'clock the next morning (Pfeiffer App., pp. 31, 32). In the interval, petitioner ate and slept aboard the Pfeiffer No. 2 (Pfeiffer App., p. 24). Shortly after plaintiff resumed work at 8:00 o'clock in the morning on January 22nd, Edward Smith, the overall repair boss

for the Pfeiffer Company, appeared (Pfeiffer App., pp. 26, 50) and told petitioner that there was too much help on the one job; accordingly, he directed petitioner to "finish putting this top deck of planks on this raft over here so we can use it. Get this job done" (Pfeiffer App., p. 26).

The nature of the conversation between Smith and the petitioner was in dispute. Smith testified that he told petitioner that he had to be laid off, but offered him an opportunity to make some money by decking the raft and the petitioner accepted the invitation (Pfeiffer App., p. 50). This alleged layoff was categorically denied by petitioner (Pfeiffer App., p. 13). It was this purported layoff that bottomed the employer's contention during the trial that at the time of his injury, petitioner was not a member of a crew but a shipyard carpenter. Suffice it to say on this aspect of the case that it was for the jury to decide what the conversation had been.

As petitioner was making preparations to descend from the Winisook to the raft in compliance with the orders that had been given him, a part of the catwalk on which he was standing suddenly gave way and he was thrown to the raft, sustaining serious personal injuries (Pfeiffer App., pp. 27-29; Braen App., p. 5).

The Pfeiffer Company had paid petitioner cure and maintenance for the injuries sustained in this accident (Braen App., p. 4).

On the basis of the above, the jury found that petitioner was a seaman and a member of the crew who was injured in the course and scope of his employment as such, entitling him to his remedy under the Jones Act.

The Court of Appeals has held that there was no jury question on the issue; that as a matter of law, "he was not injured in the course of his employment as a seaman or as a member of the crew of the Pfeiffer No. 2, and that defendant's motion for a directed verdict should have been granted" (App., p. 18).

REASONS FOR GRANTING WRIT

As to the First Question Presented

(1) The ruling of the Court of Appeals poses the question of its right and power to overturn a jury finding and direct entry of a final judgment in an area where the Court itself has conceded that issues were usually for the jury (App., p. 18). The underlying question is when is there that complete absence of probative facts to support the conclusion reached by a jury which empowers a Court of Appeals to act as this one had done.

As to the issue of petitioner's status at the time of his injury, there was the evidence that the injured had been a seaman and a member of a crew for four months up to within an hour of his accident; that he had not been laid off when the accident happened; that he could not have been laid off because of contractual provisions. There was the further evidence that the petitioner, in doing what he did and being where he was, when hurt, was acting in performance of direct orders given by his employer. There was the evidence, in the nature of admission against interest, that the employer had paid the petitioner cure and maintenance for the injuries sustained in the accident in suit.

This proof, it is submitted, comprises a more than sufficient nexus of probative facts on the issue of petitioner's status as a seaman and a member of the crew at the time he was injured so as to preclude the Court of Appeals from nullifying the jury's finding to that effect and itself directing final judgment to the contrary. It is submitted that on the very face of it there was not that absence of probative facts which empower a Court of Appeals itself to decide an issue which is fundamentally for the jury.

The ruling of the Court of Appeals bespeaks perhaps the need for a definition of what is it that constitutes such a complete absence of probative facts on the issue of whether an injured is a seaman within the meaning of the Jones Act as to allow determination of the issue as a matter of law.

Insofar as determining whether the services performed by the petitioner at the time of his accident were services performed by a seaman is concerned, there is a test. It is that "the duties of a man during the vessel travelling are relevant in determining whether he is a member of a crew while the vessel is anchored." *Senko* v. *LaCrosse Dredging Company*, 352 U. S. 370; *Grimes* v. *Raymond Concrete Pile Company*, 356 U. S. 252; *Butler* v. *Whiteman*, 356 U. S. 271.

The undisputed evidence that petitioner's duties as a seaman included minor repairs (Pfeiffer App., p. 22) joined with the proof that that was what he had been directed to do and he was about to do when injured, necessarily establish that there was a question of fact as to whether the services he had been ordered to perform was the work of a seaman and a member of the crew of the Pfeiffer No. 2.

The basis for the refusal of the Court of Appeals to apply the above test, which was the test submitted to the jury by the District Court (Pfeiffer App., p. 5), has not been explained. The ruling, on the face of it, is in conflict with this Court's decisions in *Senko* v. *LaCrosse Dredging Company*, 352 U. S. 370; *Grimes* v. *Raymond Concrete Pile Company*, 356 U. S. 252; *Butler* v. *Whiteman*, 356 U. S. 271.

(2) The Court of Appeals has noted that the raft that petitioner was about to work on pursuant to the orders of his employer was not intended to be used and was not used in repairing the cargo pump of the Pfeiffer No. 2 (App., p. 16).

If that was the basis of the Court of Appeals' ruling, it was an irrelevance. Smith testified that the raft was not intended to be used in connection with the Pfeiffer No. 2 *at that time* (Pfeiffer App., p. 52). The phraseology certainly betokens that somewhere along the line the raft was going to be used in connection with the Pfeiffer No. 2 in the same manner that it was used to repair and maintain other vessels of the Pfeiffer Company, or so a jury could find.

Moreover, the law is that it is not necessary for the application of the Jones Act that the work during which injury occurs be work immediately connected with the navigation of the vessel. *Hunt* v. *United States*, 17 F. Supp. 578, aff'd 91 F. 2d 1014, certiorari denied 302 U. S. 752; *Butler* v. *Whiteman*, 356 U. S. 271; *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416, certiorari denied 324 U. S. 872; *Wong Bar* v. *Suburban Petroleum Transport*, 119 F. 2d 745.

In the *Hunt* case, plaintiff was injured while painting rust spots in the hold while the vessel was in drydock undergoing repairs that would take two or three weeks to accomplish. The Court held that plaintiff was a member of the crew entitled to his remedy under the Jones Act even though he had not signed ship's articles.

In the *Butler* case, a tug was undergoing rehabilitation preparatory to a coast guard inspection, presumably in anticipation of a return to service. During the period of the tug's inactivity decedent was employed as a laborer doing odd jobs on defendant's wharf. At the time of the accident, plaintiff was on his way to the tug in order to clean its boilers. It was held that whether plaintiff was a seaman and a member of the crew entitled to the remedies of the Jones Act was for the jury.

In the *Marceau* case, the injured fell on a dock as he approached the ship while returning from shore leave where he had been on personal business. It was held he was entitled to his remedy under the Jones Act.

In the *Wong Bar* case, plaintiff was injured while he was leaving the vessel after having been told that no work was required of him and that he was free to go home. It was held that he was within the purview of the Jones Act.

If seamen told to depart because there is no work, or returning from a personal errand are granted the protections of the Jones Act, then, of necessity, the petitioner, a seaman injured while doing work he was so ordered to do, on a barge owned by his employer, is equally protected.

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(3) The fact that the accident did not happen on the Pfeiffer No. 2 proper but on the catwalk of the Winisook

to which it was moored is immaterial since the catwalk of the Winisook was a necessary means of passage for the members of the Pfeiffer's crew who were required to leave or board it. It not being physically a part of Pfeiffer No. 2 in no wise vitiates the employer's duties and obligations under the Jones Act. *Pettersen* v. *Alaska Steamship Co.*, 346 U. S. 914; *Standard Oil Co.* v. *Robbins Dry Dock*, 32 F. 2d 182; *Earles* v. *Howard*, 270 F. 225; *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416, cert. denied 324 U. S. 872; *Chesapeake & Ohio Railroad Co.* v. *Thomas*, 198 F. 2d 783, cert. denied 344 U. S. 921.

As to the Second Question Presented

The Court of Appeals has said that should it be wrong in thinking that no jury question was presented on the issue of petitioner's status and the case remanded to it, it would order a new trial for deficiencies in the District Court's instructions to the jury on that issue (App., pp. 18-21).

It is submitted that there is no warrant for such action.

As to Pfeiffer's Request No. 1

The District Court nowhere suggested that merely because plaintiff had been a seaman meant that he was a seaman at the time of the accident. It specifically made petitioner's activities at the time of the accident the test of his then status. The Court's charge was substantially the holding of the Court in *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, where it was said at page 373:

> "If he were a member during travel he would not necessarily lack that status during anchorage • • •

in short the duties of a man during a vessel's travel are relevant in determining whether he is a member of a crew while the vessel is anchored."

Defendant's request was phrased in the negative, i.e., merely because plaintiff had been a seaman did not make him a seaman at the time of the accident. Such a negative request did not serve to clarify any issue. Counsel might as well have requested a charge that merely because plaintiff had Coast Guard papers or had a certificate as a tank man or was a member of a seaman's union did not mean that he was a seaman at the time of the accident. The number of such negatives is limited only by the ability of counsel to conjure them up. Since the issue was plainly put to the jury that plaintiff's activities at the time of the accident were what determined his right to recover, the claim of error in the refusal to charge was without substance.

As to Pfeiffer's Request No. 2

This request was substantially charged (Pfeiffer App., p. 5). Since the substance of the request was charged, there can be no error for not using defendant's phraseology.

As to Pfeiffer's Requests Nos. 3 and 4

These requests made navigation of the vessel or furtherance of its navigation the conclusive test of plaintiff's being a seaman and a member of the crew. Such is not the law.

> "Admiralty jurisdiction and the coverage of the Jones Act depends on the finding that the injured was 'an employee of the vessel engaged in the course of his employment' at the time of his injury." *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373.

Accordingly, it has been held that it is not necessary for the application of the Jones Act that the injured be one who aids in the navigation of a vessel. The statute has been applied to such diverse employees as a cook, a bartender, a telephone operator and a musician, to name but a few. Norris, *The Law of Seamen*, Sec. 651. See also *Hunt* v. *United States*, 17 F. Supp. 578, aff'd 91 F. 2d 1014, cert. denied 302 U. S. 752; *Butler* v. *Whiteman*, 356 U. S. 271; *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416, cert. denied 324 U. S. 872.

The requests, not embodying a fully correct statement of applicable law, were properly refused.

CONCLUSION

In view of these considerations the petitioner respectfully submits that this petition should be granted.

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APPENDIX

Opinion of the United States Court of Appeals For the Second Circuit

No. 40—October Term, 1958.

(Argued October 24, 1958 Decided January 23, 1959.)

Docket No. 25095

CHRISTIAN F. BRAEN,

Plaintiff-Appellee,

—v.—

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Defendant-Appellant.

Before:

SWAN and MOORE, *Circuit Judges*, and
KAUFMAN, *District Judge.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Bruchhausen, *Judge*, after trial to a jury in an action under the Jones Act, 46 U. S. C. A. §688. Reversed.

SWAN, *Circuit Judge*:

This is an action brought under the Jones Act, 46 U. S. C. A. §688, in which plaintiff recovered judgment after a jury trial. The principal question presented by the appeal is whether at the time of his accident plaintiff was a "sea-

man" injured in the course of his employment within the meaning of the Jones Act, which provides in pertinent part:

> "Any seaman who shall suffer personal injuries in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * *"

The appellant contends that plaintiff at the time of his injury was subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.*, which provides his exclusive remedy against appellant.

Plaintiff was employed as mate on appellant's barge Pfeifer No. 2. On the day prior to his injury, which occurred on January 22, 1953 Pfeifer No. 2 came to defendant's repair yard at West Brighton, Staten Island, for repairs to a cargo pump. At the repair yard defendant maintained a covered lighter, known as the Winisook, which was used as a work barge. Its inshore side was connected with the dock by a plank runway, and between the Winisook and the dock was a raft which was employed in making certain kinds of repairs but was not intended to be used and was not used in repairing the cargo pump of Pfeifer No. 2. When the No. 2 was brought to the repair yard she was moored to the outshore side of the Winisook. On the morning of the accident plaintiff worked aboard for about an hour in dismantling the cargo pump. He was then ordered by defendant's vice-president in charge of repair work to perform some carpentry work on the above mentioned raft.[1]

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[1] Plaintiff testified on direct examination as follows:

"Q. Now, after you dismantled this protection that was over the pump, did you receive orders from one of your superiors to do something? A. I did.

Q. And who did you receive orders from? A. Mr. Edward Smith.

Q. And will you tell us what orders you received? A. We had been busy for approximately an hour, and Mr. Smith deter-

Plaintiff collected carpentry tools to be used by him on the raft and then proceeded along the "catwalk" on the side of the Winisook preparatory to boarding the raft and commencing work on it. While doing so he fell from the Winisook to the raft, sustaining the injuries for which he sued.

At the close of plaintiff's case defendant moved to dismiss the action. Decision on the motion was reserved. Defendant's motion for a directed verdict at the close of the entire case was denied. A motion for judgment n.o.v. was also denied. On its appeal defendant argues (1) that plaintiff as a matter of law is not entitled to maintain suit under the Jones Act, (2) that even if the evidence gives rise to a fact issue as to plaintiff's right to maintain the suit, the trial court failed to instruct the jury properly, and erred in denying defendant's requests to charge; and (3) that error was committed in denying defendant's motion to strike plaintiff's testimony that something on the Winisook gave way causing him to fall.

It is established law that determination as to whether a maritime employee, who may generally be classified as a seaman, may recover indemnity for injuries under the Jones Act or is limited in a federal court to compensation under the Longshoremen's and Harbor Workers' Compensation Act depends upon the nature of the service being performed at the time the injuries are sustained.[2] The Longshoremen's Act restricts the benefits of the Jones Act to "members of a crew of a vessel." *Swanson* v. *Marra*

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mined that it was too much help on the one job, and he said, 'Mr. Braen, you were formerly a carpenter,' and I said, 'Yes.'

He said, 'Well, I would like you to finish putting this top deck of planks on this raft over here, so that we can use it. Get this job done.'

Well, that was it."

[2] *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 137; *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190; *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, 340; *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370, 371.

Bros., 328 U. S. 1. To recover, therefore, the present appellee had to be a member of the crew of Pfeifer No. 2, as that term is used in the Longshoremen's Act, at the time of his injury. See *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370, 371. In that case a verdict for Senko was set aside on appeal upon the ground that the evidence was insufficient to support the finding that he was a member of a crew. This in turn was reversed, a majority of the Supreme Court holding that there was sufficient evidentiary basis for the jury's finding. In so holding the court cited *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 257 for the proposition that "whether or not an employee is 'a member of a crew' turns on questions of fact," and that if a finding on the question has evidence to support it, the finding is conclusive. We are well aware that a jury verdict is not to be upset by an appellate court, if there is any evidence to support it. But we do not understand that, when there is no such evidence, the appellate court may not upset the verdict.[3] In the case at bar there was no contradiction of plaintiff's testimony as to the nature of the service he had been ordered to perform and was about to perform when the accident happened. Nor does the record contain, in our opinion, any evidence susceptible of contrary inferences. Consequently we believe that plaintiff was subject to the Longshoremen's Act, not the Jones Act, since he was not injured in the course of his employment as a seaman or as a member of the crew of Pfeifer No. 2, and that defendant's motion for a directed verdict should have been granted.

However, should we be wrong in thinking that no jury question was presented, the case might be returned to us to pass upon the appellant's contention as to the instruc-

[3] See *Norton* v. *Warner*, 321 U. S. 565, and the dissenting opinions in the *Senko* case, 352 U. S. 374-379, and in *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252, 2 L. Ed. 737.

tions given the jury.[4] Therefore we shall consider them. We are convinced that the charge on this subject was inadequate. The court charged:

> "While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that at the time of the accident he was a member of the crew.
>
> Whether or not at the time of the accident he was engaged in functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine."

Following defendant's exception to the charge, the court stated in a supplemental charge:

> "I just want to make one amendment to my statement to you, ladies and gentlemen.
>
> I did state that it is not seriously disputed that the plaintiff was not a member of the crew. Apparently, according to the defendant's statement, he says that it is a serious issue.
>
> So I will leave that as an issue."

This only added further confusion to the original charge which failed to give the jury any test for determining whether the Jones Act was applicable to plaintiff. Defendant's exceptions to the charge were well justified. The court refused to submit four requests to charge which em-

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[4] In the *Senko* case, at page 372, the court noted that the jury's finding "was made under specific instructions not objected to here."

body a correct statement of the applicable law and should have been given, at least in substance.[5]

We see no merit in appellant's contention that plaintiff's testimony that something "gave way" on the Winisook causing him to fall should have been stricken.

For the reasons stated in the first part of our discussion we think the motion for a directed verdict should have been granted. Accordingly the judgment is reversed with directions to dismiss the complaint.

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[5] Defendant's requests read as follows:

"1. The mere fact that the plaintiff had been a seaman and member of the crew of the barge Pfeifer #2 prior to his injury does not entitle him to maintain this action against his employer.

2. It is the nature and character of the work being performed by the plaintiff at the time his injury was sustained which determines whether he has the right to maintain this law suit.

3. If you find that the work which the plaintiff was performing at the time he sustained his injury was not in connection with the furtherance of the navigation of the Pfeifer #2, your verdict must be for the defendant.

4. The evidence shows that at the time plaintiff sustained his injury he was in furtherance of the work of completing the laying of a deck on a raft. Unless you find that this work was being done by the plaintiff as a member of the crew of the Pfeifer #2 expressly for the purpose of furthering the repair of the Pfeifer #2 in order to enable it to continue in navigation, your verdict must be for the defendant."

KAUFMAN, *District Judge* (dissenting):

I fully agree with the majority as to the insufficiency of the lower court's charge with respect to plaintiff's status at the time he was injured. On that ground, I would reverse and remand. However, the majority has gone further and directed a dismissal of the complaint and on this point I must regretfully dissent.

In effect, the court finds as a matter of law that the plaintiff was not injured in the course of his employment as a seaman or crew member. As the majority concedes this is a factual question and as such is properly left to the jury whose finding will not be disturbed if there is any evidence to support it. In my opinion there was sufficient evidence in this case to enable a jury to reasonably find that plaintiff was a seaman in the course of his employment at the time he was injured. See *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 (1958); *Butler* v. *Whiteman*, 356 U. S. 271 (1958); *Sinko* v. *LaCrosse Dredging Co.*, 352 U. S. 370 (1957).

I would therefore reverse and remand for a new trial.

Applicable Statutes

1. The Jones Act, Merchant Marine Act of 1920, Act of June 5, 1920, c. 250, g 33,41 Stat. 1007, Title 35 U. S. C. A., g 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *

Appendix

2. The Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. A. Sec. 901 *et seq.* provides as follows:

Sec. 902. Definitions.

When used in this Chapter—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment * * *

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Sec. 903. Coverage.

(a) * * * No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, * * *

Sec. 905. Exclusiveness of Liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, * * *